No. 12556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. EDWARD H. TEED, *Appellee.*	No. 12556

On Appeal from the District Court of the United States, for the Eastern District of Washington

Brief for the Appellee

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STATEMENT OF JURISDICTION

This action was brought in the District Court of the United States, Eastern District of Washington, Northern Division, pursuant to the provisions of Sec. 2042 of Title 28, U.S.C. Judgment was entered on the 21st day of February, 1950. (Tr. 16 and 17). Notice of appeal was filed on April 19, 1950. (Tr. 17 and 18). This court has jurisdiction of the subject matter of the action under Sec. 1291 of Revised Title 28, U.S.C.

STATEMENT OF THE CASE

Appellee generally concurs with the statement of the case and statement of facts contained in appellant's brief on pages 2, 3, 4, and 5.

The statement of facts, however, should be supplemented by stating that the present action was first commenced by Shirley Doores who, on June 6, 1949, filed a motion with the United States District Court for the Eastern District of Washington, requesting an order directing the Clerk to disburse to her the sum of $6,150, of which sum the amount of $5,950 here in controversy is a part. (Tr. 2 and 3). It was conceded that the balance of $200.00 was the property of Miss Doores and is not involved in this appeal.

Appellee intervened in the action brought by Shirley Doores so that she is a party to the action resulting in the judgment appealed from herein. Shirley Doores was not represented in person at the time of the hearing but her duly authorized attorney submitted

the matter to the court without argument (Tr. 24, 25) on the basis of the record made at pretrial deposition of Shirley Doores (Tr. 39-51), and photostatic copies of bank statements were offered in evidence, but rejected. (Tr. 24, 25).

Miss Doores' attorney was notified of the time and place set for the hearing. There has been no appeal in this case by Miss Doores.

Concurrently with this brief, appellee has filed a motion to dismiss this appeal on the ground that the appellant is not aggrieved by the decree.

POINTS AND AUTHORITIES ON MOTION TO DISMISS

The United States of America is not an aggrieved party and is in no way legally affected by the order herein appealed from. As shown by appellant's statement of facts contained in its brief, the money here involved was taken from a safety deposit box which was under the control of Miss Shirley Doores. It was also conceded that this was the money which appellee, Dr. Teed, had given to Miss Doores. It is obvious that the money belonged either to Miss Doores or to Dr. Teed, unless there is some statute or law which resulted in a forfeiture of this money after it was seized and used as evidence in a criminal prosecution for extortion. Unless there is some provision for such forfeiture, which we have not been able to find and to which appellant makes no reference, the United States of America has no legal interest in the money but is merely the stake-holder, holding money for the

benefit of the persons to whom it is legally entitled. They assert no basis of any right to the money as such, but just object to its being turned over to appellee.

It is fundamental law that a party to a suit who is in no manner affected by the decree has no right to appeal. This interest must be immediate and pecuniary and not a remote consequence of the judgment.

4 C. J. S. 348 (Appeal and Error, Sec. 176);
2 Am. Jur. 941 (Appeal and Error, Sec. 149, 150);
2 R. C. L. 52 (Appeal and Error, Sec. 33);
Farmers Loan & Trust Co. v. Watermann, 1 Sup. Ct. 131, 106 U. S. 265, 27 L. Ed. 115;
In re Michigan-Ohio Building Corporation, 117 F. (2d) 191.

A mere stake-holder, or even an executor or trustee, who has no interest of his own in the outcome of a suit determining the distribution of funds under his control, has no right to appeal from such order of distribution.

4 C. J. S. 350 (Appeal and Error, Sec. 177);
Grier v. Union National Life Insurance Co., 217 Fed. 293;
Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, 223 Fed. 494;
King v. Buttolph, 30 F. (2d) 769;
See Note, 6 A. L. R. (2d) 147, 149.

It is true that the United States of America is in some cases allowed to intervene in actions brought to withdraw funds from the registry of the Federal

Court, such as in the case of *United States v. Cochrane,* 87 F. (2d) 3, but in such cases, the United States is representing possible owners of the fund who are not represented and is acting as a trustee for them. In this case, the only persons having any possible or conceivable interest in the ownership of this fund were represented in court, and there is no conceivable person that the United States could represent as trustee. The United States derives no claim to this money from the fact that it was deposited in the registry of the court. Monies so deposited are not public monies of the United States.

> *Chatham and Phenix Nat. Bank of City of New York v. Guaranty Trust Co. of New York,* 256 Fed. 90; cert. den. 31 Sup. Ct. 492, 250 U. S. 642, 63 L. Ed. 1185.

Sections 2041 and 2042 of 28 U. S. C. do not provide for any forfeiture of funds.

> *In re Monies in Registry of District Court,* 170 Fed. 470.

State governments may escheat unclaimed monies deposited in the registry of the United States District Courts.

> *U. S. v. Klein,* 106 F. (2d) 213; cert. den., 60 Sup. Ct. 295, 308 U. S. 618, 85 L. Ed. 517.

It should be noted also that the money here involved was still in the registry of the court and had not been deposited in the treasury under Section 2042. We have found no decisions interpreting this

statute, but it seems that the proper interpretation of the statute should be that the United States attorney is entitled to notice of petition to withdraw monies only after the five year period had passed and the money had been deposited in the treasury to the credit of the United States.

We, therefore, feel that the only parties interested in this matter are Shirley Doores, the United States District Court for the Eastern District of Washington, and the appellee, and that the appellant, United States of America, has no legal or substantial interest in this appeal, and the appeal should be dismissed.

SUMMARY OF ARGUMENT ON THE MERITS

Appellee, it is conceded, had supplied Miss Shirley Doores with narcotics in violation of the federal and state laws. After the crime had been committed, Miss Doores and her compatriots devised a scheme to extort money from appellee. Through representations to him that he would be arrested and tried for violation of the law, Miss Doores and her accomplices instilled in him a state of fear of apprehension and induced him to turn over large sums of money aggregating some $14,000 which was to be used to prevent his prosecution and resultant punishment and disgrace.

Appellee may have had a guilty intent but was not guilty of bribery or attempted bribery, and it is clear from the statement of facts, agreed to by both appellant and appellee, that Miss Doores and her conspira-

tors were the moving parties and induced the action of appellee, and, therefore, appellee was not in *pari-delicto* with Miss Doores. It is conceded by appellant that this was appellee's money and, in effect, it is admitted by appellant that if appellee was not in *pari-delicto* with Miss Doores, he is entitled to its return.

ARGUMENT

For the sake of clarity, appellee will reverse the first two sections of appellant's argument, since appellant's first argument assumes conclusions reached in its second argument.

Crime Against the Government

The government makes no contention that Dr. Teed could be guilty of bribery but charges that he is guilty of attempted bribery.

At common law, the crime of bribery comprehends the crime of attempted bribery. (8 Am. Jur. 890, Bribery, Sec. 10). Likewise, both bribery and attempt to bribe are included in the same federal statute. (18 U. S. C. Sec. 201-223, formerly Sec. 91, et al). The gist of the offense is the offering, giving, receiving or soliciting of anything of value with intent to influence the recipient's action as a public official. (8 Am. Jur. 886, 18 U. S. C. Sec. 201-223). Obviously, there must be at least an offer of something of value to an official.

In this case, there was not even an attempt by

anyone to approach, offer, or tender anything to a public official and there was thus no attempt to bribe. On the contrary, Miss Doores had no intention of offering the money to any public official. It was a pure case of extortion.

There was also no conspiracy to bribe. While a formal agreement between the parties concerned is not necessary, there must be a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.

> *Fowler v. U. S.,* 273 Fed. 15;
> *U. S. v. Direct Sales Co., Inc.,* et al, 44 F. Supp. 623, 131 F. (2d) 835, aff. 319 U. S. 703;
> *Graham v. U. S.,* 15 F. (2d) 740, cert. den. 274 U. S. 743.

Most applicable to this case are the words of Justice Cardozo in *Morrison v. California,* 291 U. S. 82 (93), 78 L. Ed. 664 (672):

> "Doi was not a conspirator however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design."

Since Dr. Teed was the only person who ever expected any of this money to find its way to a federal officer, there was no one who shared this design and purpose and therefore there could be no conspiracy to bribe.

The only case seemingly in conflict with appellee's contention as to the issue of bribery is the case of

United States v. Galbreath, 8 F. (2d) 360, a District Court case. The case can be distinguished on the ground that the person to whom the petitioner gave the money was in fact assisting an officer. Here the money was paid to Miss Doores and was not turned over, and there was no intention to turn it over to anyone having any connection with a federal officer. However, there seems in the *Galbreath* case to have been little consideration given to the necessary elements to constitute an "attempt to bribe," no citation of authority, and the money was directed to be paid into the registry of the court under the Act of January 7, 1925. (18 U. S. C., Sec. 3612, formerly Sec. 570). Former Sec. 570 provided:

> "All moneys received or tendered in evidence in any case, proceeding, or investigation in any United States court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall after the conclusion and final disposition of the particular case, proceeding, or investigation in which it was received as evidence, be deposited in the registry of the court to be disposed of under and in accordance with the order, judgment or decree of the said court, to be subject, however, to the provisions of Section 852 of Title 28. (Jan. 7, 1925, c. 33, 43 Stat. 726)."

Present Sec. 3612 is substantially the same with minor changes in phraseology.

Since the money was never "paid to or received by any official as a bribe," the statute was not applicable, but it is probable that this point was not presented to the court. Since in the present case, this

statute is not applicable, there would seem to be no statute which even inferentially authorizes the retention by the government of the money here in question.

The only applicable statutes are contained in 28 U. S. C. 2041 and 2042 (formerly 28 U. S. C., Sec. 851 and Sec. 852, 41 Stat. 654, 29 Stat. 578 and 36 Stat. 1083). Deposits of monies in court under these statutes are not public monies of the United States.

> *Chatham v. Phenix Nat. Bank of the City of New York v. Guaranty Trust Co. of New York,* 256 Fed. 90.

The appellant injects a theory that since there is evidence that appellee violated the Federal Narcotics Laws that the appellant should have the right in this proceeding to levy a fine upon him by depriving him of his money, which the District Court happens to have in its registry. The money here involved had no connection with narcotic violations but only with the extortion scheme. The appellant cites no authority for its proposition, and it is difficult to understand how, under our system of law, this proceeding can be turned into a criminal action to punish the appellee for a possible violation of a federal law. This is not a criminal prosecution and this suggestion of the appellant is quite inept. Appellee has paid at least one legal penalty and the Court can take judicial notice of the fact that appellee has paid an even more serious penalty in the form of disgrace and loss of his means of livelihood.

Pari-Delicto

The appellant's primary argument is based on the contention that the appellee was in *pari-delicto* with Miss Doores and her assistants. The appellant cites one section of Am. Juris (12 Am. Jur. 213, pages 725, 726, 727), stating the rule for which it contends. (Appellant's Brief, p. 11). The same work can be cited for the appellee. In 12 Am. Jur. 736, (Contracts, Sec. 219), the following statement is found:

> "The doctrine that the parties to an illegal transaction are not in *pari-delicto* and that the less guilty may recover is especially applicable where, although the parties concur in the illegal act, some fraud, duress, oppression, imposition, or undue influence is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former. Thus, money paid to suppress a threatened prosecution for a crime can be recovered back where the payment has been extorted or induced by duress, oppression, or undue influence. * * *"

It is conceded that there is a conflict of authority on whether money paid under threat of criminal prosecution may be recovered. The best discussion of this problem may be found in *Williston on Contracts, Revised Edition,* Vol. 5, p. 4509-4517, Sec. 1612-1616. On pages 4513-14, Mr. Williston states:

> "Some courts have held not only that a bargain induced by such threats is one to stifle prosecution, but that the parties thereto are in *pari-delicto.* That these cases are erroneous is manifest in view of the rule that where an illegal transaction is caused by coercion of one of the parties, the other is not in *pari-delicto.*"

Mr. Williston cites *Henderson v. Plymouth Oil Co.,* 13 F. (2d) 932, where the court held in a case involving threat of arrest that a transfer of stock was void and a redelivery would be ordered where the transfer was made under duress, whether the transferor was guilty of a felony or not.

As Professor Williston points out, the cases which refuse to upset a settlement made under threat of prosecution are all, or nearly all, cases where it appears that merely a fair settlement was obtained. An exhaustive list of the many cases on this subject is contained in a note in 17 A. L. R. 325 and in A. L. R. Blue Book of Supplemental Decisions, Permanent Volume, p. 177. It is not felt that the Court would desire an exhaustive discussion of each of these cases, but they do bear out the statement made by the annotator (17 A. L. R. at p. 339):

> "The courts in general endeavor to protect the victims of extortion, pure swindle or blackmail, whether they are plaintiffs or defendants."

Some of the cases not cited in the note in 17 A. L. R. but supporting this contention are:

Smith v. Blachley, 188 Pa. 550, 41 Atl. 619;
Daum v. Urquhart, 61 S. D. 431, 249 N. W. 738;
Pfeuffer v. Haas, Tex. Cir. App. 1933, 55 S. W. (2d) 111;
Bock v. Felker, 302 Ill. App. 116, 23 N. E. (2d) 568;
Berman v. Coakley, 243 Mass. 348, 137 N. E. 667;
Lindsley v. Caldwell, 234 Mo. 498, 137 S. W. 983.

Authority in both the states of Washington and Idaho, wherein the transactions took place and which should determine the property rights in this money, seems in accord with the doctrine contended for by appellee.

> *Bertschinger v. Campbell,* 99 Wash. 142, 168 Pac. 977;
> *Wilbur v. Blanchard,* 22 Ida. 517, 126 Pac. 1069.

The Washington cases cited in appellant's brief on page 12 are obviously not in point since there is no element of coercion in the cases cited. The acts of the parties in those cases were purely voluntary acts.

The case of *Clark v. U. S.,* (102 U. S. 322), cited by the appellant, is not applicable to this case. *Clark v. U. S.* was a clear case of bribery and there was no duress. It appears that the action of the briber was purely voluntary and nowhere in the case is there any discussion of the doctrine here contended for.

The case of *U. S. v. Thomas,* 75 F. (2d) 369, cited by the appellant, is also not in point for the same reason. It should be pointed out that this case, in addition to citing *Clark v. U. S.* supra, cited *St. Louis, V. & T. H.R. Co. v. Terre Haute & I. R. Co.,* 145 U. S. 393. The court, in the latter case, at pages 407 and 408, states:

> "* * * For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime and the stifling of a criminal prosecution, and therefore clearly illegal, can-

> not be recovered back at law, nor the conveyance set aside in equity, *unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor.''* (Italics added).

The appellant cites *U. S. v. Connoughton,* 39 F. (2d) 237. There a defendant was charged with conspiracy to bribe. The sum of $300.00 was found upon his person when seized. He pleaded guilty to the charge. Two of his co-defendants were acquitted; another pleaded guilty. He asked for return of the $300.00. The court ordered its return. Whether the money was actually ever offered to a federal agent is not clear.

If it is an authority at all, it is an authority for appellee.

Since there was no transfer or even offer of transfer of this money to any federal official, the most that can be said for the appellant's position is that Dr. Teed put money into the hands of a purported agent with the intent that such agent should use the money for the purpose of bribing federal officials, although the agent had no intention of doing so.

There are several well considered cases holding that money placed in the hands of an agent for the purpose of bribing or otherwise illegally using influence, but not so used, is recoverable by the principal.

> *Wasserman v. Sloss,* 117 Cal. 425, 49 P. 566;
> *Ware v. Spinney,* 76 Kan. 289, 91 P. 787;
> *Adams Express Co. v. Reno,* 48 Mo. 264;
> *Liebman v. Rosenthal,* 185 Misc. 837, 57 N.

Y. S. (2d) 875, affd. 269 App. Div. 1062, 59 N. Y. S. (2d) 148;
Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163.

CONCLUSION

While we have attempted to answer in some detail the arguments of the appellant, this matter can be decided on a fairly simple basis. The District Court has found that the money in question is appellee's money, and that he is entitled to its return; and unless the appellant can show some reason why such money should not be returned to appellee, he is entitled to have it paid over to him. The appellant has shown no right to the money and no statutory or other authority for confiscating this money or imposing such a penalty upon Dr. Teed, and, therefore, the appellant's claim to the money must necessarily fail.

Respectfully submitted,

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